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**ABORIGINAL PEOPLES AND CANADIAN CRIMINAL  
JUSTICE**

**LAW 477H1S**

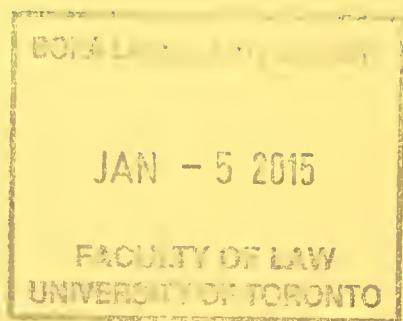
**WINTER 2015**

Instructors:  
Katherine Hensel  
Promise Holmes Skinner

**COURSE MATERIALS**

**VOLUME 2**

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# ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE

## LAW477H1S

### COURSE OUTLINE

UNIVERSITY OF TORONTO, FACULTY OF LAW

2014-2015 Academic Year

Katherine Hensel  
Promise Holmes Skinner

**Course Description:** Aboriginal people are significantly and tragically overrepresented in Canada's prisons and criminal courts. This is the result of a numerous factors, some of which are intrinsic to Canada's criminal justice system, and some of which are extrinsic to that system.

The first half of this course will provide students with a historical, theoretical, policy and legal background for the current relationship between Aboriginal people and the criminal justice system. This will include some examples of the Indigenous laws that were supplanted by Canadian criminal law, and the processes through which these laws were and are disregarded by Canadian colonial and contemporary governments. The resulting cultural and legal dissonance continues to play out in courtrooms across the country. That dissonance, combined with crushing poverty, racism, legacy of residential schools, and other factors, results in a profoundly disproportionate over involvement of Aboriginal people in the criminal justice system.

The second half of the course will examine each stage of the criminal justice process, including policing, arrest, judicial interim release, trial, sentencing, and parole. The jurisprudence and scholarly commentary concerning the experience of Aboriginal peoples at each these stages will be discussed, with a focus on those issues that are particular to Aboriginal people, whether from a Canadian or an Indigenous perspective.

Students will be encouraged, through class discussions and assignments, to critically apply the considerations and analysis covered in the first half of the course to the more concrete elements of the criminal justice process, as they are covered in the second half of the course.

Through their coursework and assignments, students will be encouraged to critically examine their own and the criminal justice system's assumptions about Aboriginal peoples and Indigenous laws, as well as the destructive role the criminal justice system has played and continues to play in the lives of many Aboriginal people.

#### **Evaluation:**

Students will be asked to submit one short paper of no more than 10 pp in length (for 30% each) and one longer paper of no more than 20 pp in length (for 50%), and will lead classroom discussions for one class. The shorter papers will relate to these student-led classes.

#### **Texts:**

*Criminal Code of Canada*

John Borrows, *Canada's Indigenous Constitution*, University of Toronto Press, 2010  
Course Reader

**ABORIGINAL PEOPLES AND CANADIAN CRIMINAL JUSTICE**  
**SYLLABUS**

**CLASS I: Introduction and overview**

**Thursday, January 8, 2015 4:10-6pm**

An introduction and overview to the class and readings, including a framework within which Indigenous traditional knowledge and law will be presented, and the limitations of some of the texts.

**CLASSES II & III: Indigenous Laws and Tradition: Dealing with Transgression:**

Prior to the arrival of Europeans in Canada, Indigenous peoples had a variety of ways of addressing transgressions by their members, as well as transgressions as between nations. This lecture will provide a (very) cursory overview and number of examples of those traditions, based on historical and contemporary accounts of those traditions. Students will be advised that the lecturer is not an expert in Indigenous legal traditions, and that the authoritative conduits for such knowledge, tradition and law are First Nations elders and (sometimes) chiefs and other leaders. The objective of the lecture and readings will be to ensure students are aware that there was and are laws indigenous to Canada, including laws addressing what Canadian law terms 'criminal' conduct. Although those laws do not presently have the force and effect of law within the Canadian justice system, many Aboriginal people continue to consider themselves bound by them, in their day to day conduct, relations, and approach to contemporary disputes and transgressions.

*Readings:*

**Class II**

**Thursday, January 15, 2015 4:10-6pm**

Manitoba Justice Inquiry, *Chapter 1: The Inquiry and the Issues: The Justice and System and Aboriginal People*

Royal Commission on Aboriginal Peoples, Preface and Introduction, from *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*

*R v Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.)

**Class III**

**Thursday, January 22, 2015 4:10-6pm**

Borrows, Chapters 1 and 3

Royal Commission on Aboriginal Peoples: Chapter 1: Aboriginal Concepts of Law and Justice – the Historical Realities, from *Bridging the Cultural Divide*,

Darlene Johnston, “Aboriginal Traditions of Forgiveness”

**CLASS IV.      The Arrival of Canadian Criminal Justice: Historical Overview and Contemporary Realities**

**Thursday, January 29, 2015 4:10-6pm**

*Readings:*      Borrows, Chapter 5

Excerpts, Report on the Cariboo-Chilcotin Justice Inquiry (To be distributed electronically)

Manitoba Justice Inquiry, Chapter 3

**CLASS V.      Systemic Racism and Canadian Criminal Justice and Contributing Factors from Outside Criminal Justice**

I will discuss the contribution of factors extrinsic to the criminal justice system that contribute to the overpolicing and overrepresentation of the criminal justice system, including

**Thursday, February 5, 2015 4:10-6pm**

*Readings:* Excerpts from:      Ipperwash Inquiry, Volume 1 – Executive Summary, and Volume 2, Executive Summary

Stonechild Inquiry, Part 5: Overview of the Evidence

Oppel Inquiry: The Commission of Missing and Murdered  
Commission of Inquiry Executive Summary (to be distributed electronically)

RCMP Report: Missing and Murdered Aboriginal Women: A  
National Operational Overview

Iacobucci Report

*R v Marshall* (both decisions, pp. 246-308)

*R v Williams*, [1998] 1 S.C.R. 1128 (S.C.C.)

Borrows, pp. 165-174

D. Worme and K. Hensel, "The Face of Hatred: Hate Crimes and Aboriginal Peoples", in National Secretariat Against Hatred and Racism, *Report on the October 23, 2005 Symposium R. v. Gladue*

*R v Paul (both cases, pp. 398-442)*

## Excerpts, Couchiching First Nation, Treatment and Support Services Project, Final Report (to be distributed electronically)

*R v M.(B.)*, [2003] 3 C.N.L.R. 277

*R v M.(B)* [B.M.], [2003] S.J. No. 602, 2003 SKPC 133

*R v B.L.M.*, [2003] S.J. No. 870, 2003 SKCA 135

Richard, Kenn, Chapter 9: On the Matter of Cross-Cultural Aboriginal Adoptions, Putting a Human Face on Child Welfare, 2007, Chpt 9. Pp. 189-202

*R v Kokopenace* 2013 ONCA 389

## CLASS VI. Policing, Arrest, Bail, Decisions on Plea and Conduct of Trial

**Thursday, February 12, 2015 4:10-6pm**

*Readings: Arrest provisions and s. 515 of the Criminal Code*

*R v Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.), paras. 33, 64-68, 88

*R v Bain*, [2004] O.J. 6147 (Ont. S.C.J.)

*R v Silversmith*, [2008] O.J. No. 4646 (Ont. S.C.J.)

*R v Williams*, [1998] 1 S.C. R. 1128 (S.C.C.)

*R v Moneyas* (1995), 194 A.R. 1 (C.A.)

*Frontenac Ventures Corp. v Ardoch Alg*

*McKay v Toronto Police Services Board*, 2011 HRTO 499

*Kelly v B.C. (Ministry of Public Safety and Solicitor General)*

S. Perreault, "Violent victimization of Aboriginal people in the Canadian provinces,

S. Perreault, "The incarceration of Aboriginal people in adult correctional services"

(Juristat article, 2011)

## CLASSES VII & VIII      *Sentencing: s. 718.2(e) and R. v. Gladue*

Thursday, February 26, 2015 4:10-6pm

**Thursday, March 5, 2015 4:10-6pm**

*Readings:* Sections 109, 110, 113 and 718 of the *Criminal Code*

*R v United States v. Leonard* [2012] ONCA 622

*R v Gladue*

*R v Wells* (2000), 141 C.C.C. (3d) 368, 30 C.R. (5<sup>th</sup>) 254, 182 D.L.R. (4<sup>th</sup>) 257, [2001] 1 S.C.R. 207 (S.C.C.)

R v Paul

*R v Meawasige*, 2008 ONCJ 122 (Ont. C.J.)

*R v Kakekagamic*, (2006), 81 O.R. (3d) 664 • (2006), 211 C.C.C. (3d) 289 • (2006), 40 C.R. (6th) 383 • (2006), 214 O.A.C. 127

*R v Napesis*, 2010 BCCA 499

*R. (J.),* 2006 CanLII 40236, [2006] O.J. No. 4777 (S.C.J.), aff'd in part [2008] O.J. No. 1054, 59 C.R.(6<sup>th</sup>) 158 (C.A.), leave to appeal to S.C.C. dismissed, [2008] S.C.C.A. No. 231

*R v Jararuse*, [2001] N.J. No. 431 (Nfld. & Lab. Prov. Ct)

*R v Proulx*, [2001] 1 S.C.R.

*R v Collins*, 2011 ONCA 182

*R v Ipeelee*, [2012] S.C.J. No. 13

*R v Anderson* 2014 SCC 41

## CLASS IX. Issues in the Courtroom/Courtroom visit

Thursday, March 12, 2015 4:10-6pm

Aside from larger systemic and policy issues, the concrete reality of Canadian legal processes continue to present problems for Aboriginal people, from an evidentiary, procedural and logistical perspective. This lecture examine the clash of cultural values and legal traditions as it plays out in Canadian courtrooms, usually to the detriment of the Aboriginal parties. This is true in civil cases where Aboriginal peoples find themselves embroiled in disputes brought before Canadian courts, including cases where First Nations bring suits against the Crown or each other.

But nowhere is it more true than in a criminal courtroom where the only Aboriginal person in the room is, with a few notable exceptions, the accused person, who is entirely at the mercy of the system.

Of particular concern are:

Courtroom set up  
Courtroom protocol  
Evidence  
*Viva voce* evidence from Indigenous witnesses  
Conduct of the Court: Judges, Crowns, Defence and Duty Counsel  
The Role of the Native Court Worker  
The Role of Lawyers

*Readings:* *R v Moneyas*

J. Rudin, “Aboriginal Peoples and the Criminal Justice System”

M. Green, “The Challenge of *Gladue* Courts”

### **The Criminalization of Indigenous Political Activity**

*Readings:*

*Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 338 • (2006), 273 D.L.R. (4th) 284

*Frontenac Ventures Corporation v Ardoch Algonquin First Nation*

*Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533

*Excerpts from the Ipperwash Inquiry*

### **CLASS X.**

### **Restorative Justice: An attempt to integrate Indigenous legal principles and Canadian law**

**Thursday, March 19, 2015 4:10-6pm**

*Readings:*

M.E. Turpel-Lafond, “Sentencing within a restorative justice paradigm: Procedural Implications of *R. v. Gladue*” (1999) 43 Crim. L.Q. 34

*R v Moses* (1992), 11 C.R. (4<sup>th</sup>) 357, 71 C.C.C. (3d) 347, [1992] 3 C.N.L.R. 116 (Y.T. Terr. Ct.)

*P.(C.),* [1995] Y.J. No. 186 (Terr.Ct.)

*R v Munson* (2001), 214 Sask. R. 262, [2002] 1 C.N.L.R. 323

*R v Morin* (1995), 101 C.C.C. (3d) 124, 42 C.R. (4<sup>th</sup>) 339, 134 Sask. R. 12, [1995] 9 W.W.R. 696 (Sask. C.A.)

*R v Manuel*, 2007 BCCA 178 (CanLII)

*R v Tuglavina*, 2011 NLCA 13

## **CLASS XI: The Way Forward: Developing Canadian law and revitalizing Indigenous legal traditions**

**Thursday, March 26, 2015 4:10-6pm**

*Readings:*

Gordon Christine, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions”, in *Indigenous Law Journal*, Fall 2007, Vol. 6, No. 1

Borrows, Chapters 7-10



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3.	<i>R. v. Gladue</i> (1999), 133 C.C.C. (3d) 385 (S.C.C.)	24-81
4.	Royal Commission on Aboriginal Peoples: Chapter 1: Aboriginal Concepts of Law and Justice – the Historical Realities, from <i>Bridging the Cultural Divide</i>	82-92
5.	Darlene Johnston, “Aboriginal Traditions of Tolerance and Reparation”, from <i>Le devoir de mémoire et les politiques du pardon</i> (Presses de l’Université du Québec, 2005).	93-105
6.	Manitoba Justice Inquiry, <i>Chapter 3: An Historical Overview</i>	106-135
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10.	<i>R. v. Marshall</i> , [1999] S.C.J. No. 55	246-288

11.	<i>R. v. Marshall</i> , [1999] S.C.J. No. 66	289-308
12.	D. Worme and K. Hensel, "The Face of Hatred: Hate Crimes and Aboriginal Peoples", in National Secretariat Against Hatred and Racism, <i>Report on the October 23, 2005 Symposium</i>	309-331
13.	<i>R. v. Paul</i> (Ontario Court of Justice, 2006)	332-355
14.	<i>R. v. M.(B.)</i> , [2003] 3 C.N.L.R. 277	356-389
15.	<i>R. v. M.(B) [B.M.]</i> , [2003] S.J. No. 602, 2003 SKPC 133	390-399
16.	<i>R. v. B.L.M.</i> , [2003] S.J. No. 870, 2003 SKCA 135	400-421
17.	<i>R. v. Bain</i> , [2004] O.J. 6147 (Ont. S.C.J.)	422-433
18.	<i>R. v. Williams</i> , [1998] 1 S.C. R. 1128 (S.C.C.)	434-451
19.	<i>R. v. Moneyas</i> (1995), 194 A.R. 1 (C.A.)	452-473
20.	<i>Frontenac Ventures Corp. v. Ardoch Algonguin First Nation</i> , 2008 ONCA 534 (para. 56)	474-489
21.	<i>Kelly v. B.C. (Ministry of Public Safety and Solicitor General) (No. 3)</i> , 2011 BCHRT 183	490-589
22.	<i>McKay v. Toronto Police Services Board</i> , 2011 HRTO 499	590-651

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23.	S. Perreault, "The incarceration of Aboriginal people in adult correctional services, 2009" (Juristat article, 2009)	652-679
24.	S. Perreault, "Violent victimization of Aboriginal people in the Canadian provinces, 2011" (Juristat article, 2011)	680-715
25.	<i>R. v. Wells</i> (2000), 141 C.C.C. (3d) 368, 30 C.R. (5 <sup>th</sup> ) 254, 182 D.L.R. (4 <sup>th</sup> ) 257, [2001] 1 S.C.R. 207 (S.C.C.)	716-737
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28.	<i>R. v. Napesis</i> , 2010 BCCA 499	760-767
29.	<i>R.(J.)</i> , 2006 CanLII 40236, [2006] O.J. No. 4777 (S.C.J.), aff'd in part [2008] O.J. No. 1054, 59 C.R.(6 <sup>th</sup> ) 158 (C.A.), leave to appeal to S.C.C.	768-785

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30.	<i>R. v. Jararuse</i> , [2001] N.J. No. 431 (Nfld. & Lab. Prov. Ct)	786-799
31.	<i>R. v. Proulx</i> , [2001] 1 S.C.R.	800-849
32.	<i>R. v. Collins</i> , 2011 ONCA 182	850-869
33.	<i>R. v. Ipeelee</i> , [2012] S.C.J. No. 13	871-924
34.	J. Rudin, "Aboriginal Peoples and the Criminal Justice System"	925-994
35.	M.E. Turpel-Lafond, "Sentencing within a restorative justice paradigm: Procedural Implications of <i>R. v. Gladue</i> " (1999) 43 Crim. L.Q. 34	995-1012
36.	<i>R. v. Moses</i> (1992), 11 C.R. (4 <sup>th</sup> ) 357, 71 C.C.C. (3d) 347, [1992] 3 C.N.L.R. 116 (Y.T. Terr. Ct.)	1013-1046
37.	<i>P.(C.)</i> , [1995] Y.J. No. 186 (Terr.Ct.)	1047-1058
38.	<i>R. v. Munson</i> (2001), 214 Sask. R. 262, [2002] 1 C.N.L.R. 323	1059-1066
39.	<i>R. v. Morin</i> (1995), 101 C.C.C. (3d) 124, 42 C.R. (4 <sup>th</sup> ) 339, 134 Sask. R. 12, [1995] 9 W.W.R. 696 (Sask. C.A.)	1067-1110
40.	<i>R. v. Manuel</i> , 2007 BCCA 178 (CanLII)	1111-1116
41.	<i>R. v. Tuglavina</i> , 2011 NLCA 13	1117-1140
42.	<i>Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council</i> (2006), 82 O.R. (3d) 338 • (2006), 273 D.L.R. (4th) 284	1141-1150
43.	<i>Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation</i> , 2008 ONCA 533	1151-1154
44.	Gordon Christine, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions", in <i>Indigenous Law Journal</i> , Fall 2007, Vol. 6, No. 1	1155-1168
45.	<i>R. v. Silversmith</i> , [2008] O.J. No. 4646 (Ont. S.C.J.)	1169-1178
46.	Richard, Kenn, Chapter 9: On the Matter of Cross-Cultural Aboriginal Adoptions, <i>Putting a Human Face on Child Welfare</i> , 2007, Chpt 9. Pp. 189-202	1179-1192
47.	Royal Canadian Mounted Police: Missing and Murdered Aboriginal Women: A National Operational Overview	1193-1215

48.	Iacobucci Report: First Nations Representation on Canadian Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci, February 2013	1216-1223
49.	<i>R v Kokopenace</i> 2013 ONCA 389	1224-1266
50.	<i>R v Anderson</i> 2014 SCC 41	1267-1282
51.	M. Greene, “The Challenge of <i>Gladue</i> Courts”, <i>Ontario Reports Articles</i> , 2012, 6 <sup>th</sup> Series	1283-1296